

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,        ) 05-cr-440-13  
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JAMES MORRIS,                        ) Philadelphia, PA  
                                      ) November 2, 2010  
                                      )  
Defendant.                            ) 10:06 a.m.

TRANSCRIPT OF SENTENCING  
BEFORE THE HONORABLE R. BARCLAY SURRICK  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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I N D E X

ARGUMENT:

By Mr. Bresnick  
By Mr. Powell  
By Mr. Thompson

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## Colloquy

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1 THE COURT: Okay. We have the case of United States  
2 versus James Morris. It's number 05-440-13. Counsel, please  
3 identify yourselves.

4 MR. BRESNICK: Good morning, Your Honor. Mike  
5 Bresnick from the US Attorney's Office. With me at counsel  
6 table is Mike Ricko from ATF --

7 MR. RICKO: Good morning, Your Honor.

8 MR. BRESNICK: -- and Ray Armstrong from IRS.

9 MR. ARMSTRONG: Good morning, Your Honor.

10 MR. POWELL: Good morning, Judge. If Your Honor  
11 please, Wayne Powell appearing on behalf of defendant James  
12 Morris.

13 MR. THOMPSON: Good morning, Your Honor. If it  
14 please the Court, Ronald Thompson also appearing on behalf of  
15 James Morris.

16 THE COURT: All right. Counsel, we're here for  
17 sentencing this morning. Mr. Morris was found guilty on Count  
18 1 of conspiracy to distribute controlled substances, and Counts  
19 52, 53, 54 and 55, use of the communication facility to  
20 facilitate drug trafficking. You have received a copy of the  
21 pre-sentence report. The pre-sentence calculates the  
22 sentencing Guidelines based upon a base offense level of 38 and  
23 a criminal history category of four to be 324 to 405 months.

24 The defendant suggests that the Guidelines should be  
25 more properly 262 to 327 months, based upon a -- an offense

## Colloquy

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1 level of 36 and a criminal history category of four. The  
2 Government does not object to that. The Government is  
3 satisfied that the Court determined the Guideline range is 262  
4 to 327 months based upon a jury's verdict. They specifically  
5 found five kilos or more of cocaine and 50 grams or more of  
6 crack cocaine. And the Government is satisfied with that.  
7 Also, suggests that it really doesn't make any difference  
8 because the defendant has two prior drug convictions and,  
9 therefore, there's a mandatory life sentence here.

10 Counsel, you have received the pre-sentence report.  
11 Are there any objections to it at this juncture?

12 MR. POWELL: Judge, we have none, other than what the  
13 Court has already set forth on the record and the objections  
14 which we submitted to the --

15 THE COURT: I can't hear you, counsel.

16 MR. POWELL: And the objections which the Court has  
17 made reference to, which we submitted to Pre-trial Services.

18 THE COURT: Mr. Bresnick, do you have any objections?

19 MR. BRESNICK: No objections, Your Honor. I -- I  
20 would like to just clarify one thing Your Honor said, that the  
21 -- the Government does not object to the offense level being 36  
22 because the amount of cocaine involved was at least 50  
23 kilograms of cocaine powder, not -- not just the five kilograms  
24 that Your Honor referred to. It was 50 kilograms. That's what  
25 gets the defendant to the offense level of 36.

## Powell - Argument

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1 THE COURT: All right. I am going to accept the  
2 Guideline range based upon a 36 and a -- and a criminal history  
3 category of four. I'm going to find that the sentencing  
4 Guidelines here are 262 to 327 months.

5 Mr. Thompson and Mr. Powell, you -- you've objected  
6 to paragraph 32, to paragraph 48 and to paragraph 85. I have  
7 reviewed those objections. If you have anything more you want  
8 to say, I'll hear it.

9 MR. POWELL: No, Judge, we'll submit on the  
10 objections.

11 THE COURT: I'm going to overrule those objections.  
12 I think the evidence establishes the facts made -- found in  
13 those paragraphs.

14 All right. Counsel, I'll hear whatever you have to  
15 say on behalf of your client from the defense.

16 MR. POWELL: I'm sorry, Judge, I thought the  
17 Government got to go first. I apologize. Judge, we've had an  
18 opportunity to review the -- the pre-sentence report and had an  
19 opportunity to discuss this matter with the defendant in this  
20 case. Judge, I understand that the Government takes the  
21 position that the mandatory minimum applies in this case to Mr.  
22 Morris. Our position is that the Court does not have to impose  
23 the mandatory minimum in this case.

24 The Government relies upon the -- the language of the  
25 statute, which requires that if the quantity in question

1 exceeds five kilograms of powder cocaine and more than 50 grams  
2 of crack cocaine, that the defendant is subject to a mandatory  
3 life sentence, given defendant's prior convictions. And the  
4 Government has filed an application for enhancement with  
5 respect to those. Our position, Judge, is that the Court is  
6 not obligated to impose the mandatory minimum in this case.

7 One, Judge, we suggest that there are insufficient  
8 facts from which to find that the mandatory minimum is  
9 applicable to this defendant. Specifically, Judge, at the time  
10 that the jury heard the evidence in this case, they received a  
11 jury interrogatory asking, with respect to Count 1, as to  
12 whether or not the jury found the defendant guilty or not  
13 guilty for more than five kilos of powder cocaine and more than  
14 50 grams of crack cocaine. There was no special interrogatory  
15 provided to the jury pursuant to Apprendi, so that the jury  
16 could make some determination as to the actual amount of powder  
17 cocaine and/or crack cocaine that the jury was satisfied beyond  
18 a reasonable doubt had been established by the Government.

19 I understand, Judge, that the Government's position  
20 is that that doesn't make any difference, that anything which  
21 exceeds five kilograms is sufficient for the Court to find that  
22 Count 1 has been proven beyond a reasonable doubt and has  
23 subjected defendant to the mandatory minimum penalty. Our  
24 position, Judge, is that the jury should have been supplied  
25 with a special interrogatory, so that the Court would have

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1 before it as a part of the record a finding that, in fact, the  
2 amount in question did exceed the statutory minimum, which  
3 would subject this defendant to the mandatory minimum under the  
4 statute.

5 We would suggest, Judge, that if you accept the  
6 premise that the sentencing Guidelines are no longer mandatory  
7 but are now discretionary under US versus Booker and US versus  
8 Cooper, that it's within this Court's discretion to sentence  
9 the defendant within the Guideline range between 262 and 327  
10 months. In view of the fact that the Government does not  
11 object to that calculation, we would ask that the Court  
12 consider sentencing this defendant to 262, a sentence which is  
13 within the Guideline range between 262 and 327 months.

14 Given, Judge, the defendant's past criminal history,  
15 the defendant certainly understands that the Court may not be  
16 inclined to sentence the defendant at the lower end of the  
17 range but toward the higher end of the range. But we would ask  
18 that the Court sentence within that range, as opposed to  
19 imposing a -- a mandatory life sentence.

20 THE COURT: All right. Mr. Bresnick.

21 MR. BRESNICK: Your Honor, may I approach the  
22 lectern?

23 THE COURT: Yes, indeed.

24 MR. BRESNICK: Your Honor, the mandatory life  
25 sentence indeed does apply in this instance. The jury, by its

Thompson - Argument

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1 own special interrogatory, found that a conspiracy involved of  
2 five kilograms or more of cocaine powder and 50 grams or more  
3 of crack cocaine. More specifically, Your Honor, the jury  
4 heard substantial evidence about Mr. Morris involvement with at  
5 least 50 kilograms of powder and numerous discussions between  
6 him and Coles where the two of them were discussing Morris's  
7 delivery of the 50 kilograms of cocaine powder to Mr. Coles, as  
8 well as the delivery and payment for another seven or eight  
9 kilograms of cocaine from Morris to Coles in July of 2005.

10 Again, Your Honor, the jury's verdicts of the  
11 telephone count of 52 through 56, where they convicted the  
12 defendant of discussing and using the telephone to discuss with  
13 Mr. Coles the delivery of 50 kilograms of cocaine powder and  
14 additional cocaine trips to Cancun to obtain cocaine, when the  
15 cocaine would be delivered. I mean, the -- the telephone  
16 conversations between the two of them about cocaine were ample.  
17 So, Your Honor, under statute under 841b1A, the Court is  
18 statutorily obligated to sentence the defendant to life in the  
19 sentence. And as -- as regards to the 3553(a) factor, Your  
20 Honor, I -- I do think by imposing sentence, Your Honor, should  
21 address them in some respect. And Your Honor, the Government  
22 will rest on this sentencing memorandum.

23 THE COURT: All right. Counsel, you want to bring  
24 your client forward.

25 MR. THOMPSON: Your Honor, I do have one question.



## Thompson - Argument

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1 851 motion, when was that filed? Do we have the records when  
2 that was filed?

3 MR. BRESNICK: I -- I saved the docket number and the  
4 sentencing memorandum, Your Honor. I don't have the specific  
5 date.

6 MR. THOMPSON: The time -- the time is what we're  
7 looking at.

8 THE COURT: That was filed on December 18, 2007.

9 THE DEFENDANT: What time, Your Honor?

10 MR. THOMPSON: Do we have a time, by any chance, Your  
11 Honor?

12 THE COURT: Time of day?

13 MR. THOMPSON: Yes, Judge.

14 THE COURT: 2:05 it looks like. No, I'm sorry,  
15 that's not the time. I have the date. 12/18/07 is on the  
16 docket. (pause)

17 MR. THOMPSON: Judge, are we able to tell what time  
18 the jury was sworn in that day?

19 THE DEFENDANT: What time was the jury impaneled on  
20 the 18th?

21 MR. THOMPSON: On the 18th, what time the jury was  
22 impaneled? Do we have that on the docket, Judge?

23 THE COURT: I -- it may be part of the docket,  
24 counsel. I don't have the --

25 THE DEFENDANT: We need it.

Bresnick - Argument

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1 THE COURT: -- full docket with me right now.

2 THE DEFENDANT: Your Honor, we need it.

3 MR. THOMPSON: Judge, just if I may, very briefly,  
4 with regard to comments made by Mr. Bresnick. Judge, my  
5 recollection of what is contained in the record concerning the  
6 amounts and the conversations back and forth between Mr. Coles  
7 and Mr. Morris, there was a number discussed, 50, but it wasn't  
8 -- 50 what? It just -- there was no conversation to that -- in  
9 that regard, Judge. And it would seem that given that fact,  
10 there would be a need at least for an evidentiary hearing on  
11 that issue.

12 THE COURT: Mr. Bresnick.

13 MR. BRESNICK: Your Honor, the evidentiary hearing  
14 took place during the trial in this matter, and the jury  
15 convicted the defendant of those counts.

16 MR. THOMPSON: Judge, but I think that puts us in --  
17 into an Apprendi issue, Judge, when the Court is left to decide  
18 what that 50 means. A special interrogatory could have done  
19 it.

20 THE COURT: Well, didn't -- the jury did, in fact,  
21 find that there were five kilos or more of cocaine and 50 grams  
22 or more of crack cocaine that were part of your conspiracy  
23 which your client was found guilty of.

24 MR. BRESNICK: Yes, Your Honor. And -- and more than  
25 that, they convicted him of the telephone counts involving the

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1 discussion of the delivery of 50 kilograms of cocaine powder.  
2 And Your Honor -- of course, Your Honor is entitled to make  
3 findings of fact pursuant to a -- by a preponderance of the  
4 evidence under the pari standard (phonetic). Nothing here is  
5 raising the stat max (phonetic). It's simply affecting the  
6 mandatory minimum sentence that should be imposed in this case.

7 THE COURT: All right. Counsel, anything further?

8 MR. THOMPSON: Nothing, Judge.

9 THE COURT: All right. You want to bring your client  
10 forward.

11 THE DEFENDANT: We need the motion, man. I'm trying  
12 to object to the 851. We need -- we need a docket, Your Honor.

13 THE COURT: Mr. Finney, can you bring up the docket?

14 MR. FINNEY: I'd have to go back in the office.

15 THE COURT: All right. We'll take a brief recess and  
16 we'll get the docket for you, counsel.

17 MR. THOMPSON: Thank you, Your Honor.

18 (Recess)

19 THE COURT: All right. Counsel, we've -- Mr. Finney  
20 has gotten a copy of the docket entries and given those to you.  
21 I will hear whatever you have to say at this juncture.

22 MR. POWELL: Judge, we've had an opportunity to  
23 review the -- the docket. And it appears, Judge, that Mr.  
24 Morris actually has a point. US versus White requires, Judge,  
25 that the 851 motion be filed before the commencement of -- of

Bresnick - Argument

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1 jury selection. Jury selection started on -- according to the  
2 docket, on December 18, 2007. The -- the Government's Section  
3 851 motion was filed on that same date, Judge. I guess the  
4 issue here is when it was filed.

5 Jury selection commenced at 9:30 a.m. If the  
6 Government's motion was filed prior to 9:30 a.m., then it would  
7 seem that the Government's motion was timely filed and the  
8 defendant would be subject to an enhanced sentence, given that  
9 notice. If it was filed at 9:31 or after, it seems to me,  
10 Judge, there's an issue as to whether or not the Court could  
11 sentence this defendant to an enhanced -- an enhanced sentence.  
12 There's nothing in the record, Judge, which indicates the time  
13 that the motion was actually filed. I suppose we have to check  
14 the -- with the clerk and find out at what time the motion  
15 itself was -- was stamped filed for that date.

16 THE COURT: Well, in any event, the docket entries  
17 reflect that the 851 was filed before we began jury -- the jury  
18 selection.

19 MR. POWELL: Judge, if you look at the docket,  
20 chronologically the motion does appear on this number 591, and  
21 the commencement of jury selection appears as number 592, but  
22 there's no actual indication of the actual time that the motion  
23 was filed. And I suppose we'd have to --

24 THE COURT: Mr. Bresnick.

25 MR. BRESNICK: Well, I'll address that later point

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1 first. I mean, it is -- does appear on the docket before the  
2 jury selection. I don't know what time we filed it, Your  
3 Honor. I can't remember. This was three years ago. And --  
4 and standing here today, he's citing a case. I don't know what  
5 that case is. I haven't had a chance to look at it. I don't  
6 even know if the Government has to file the information before  
7 the jury is impaneled or before the jury is sworn.

8 I thought it was before the jury was sworn, because  
9 that's when jeopardy attaches. But I mean, maybe in the first  
10 instance we can find out when exactly -- if this is an issue  
11 for Your Honor, if the fact that the information is in docket  
12 number 591 and the -- the docket number for the jury selection  
13 592 isn't enough for the Court, then we could -- we could find  
14 out the answer of exactly what time it was filed. I -- you  
15 know, I don't know if Your Honor wants to proceed that route.

16 THE COURT: Well, I -- I would suggest -- this is a  
17 serious matter. The Court, if required, would have to sentence  
18 Mr. Morris to life imprisonment. And I think before we go one  
19 step further, we'll give you the opportunity to get the answer  
20 to that. Number one, get the answer to what time -- if you can  
21 get the answer, what time those -- the 851 was filed, as  
22 opposed to what time the jury began -- jury selection began.  
23 And to give you a chance to take a look at the case that's been  
24 cited for the proposition that it is before the jury selection  
25 begins rather than before it's sworn that counts. So --

## Colloquy

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1 MR. BRESNICK: It's not even clear, Your Honor, from  
2 the docket in 592 that jury selection began at 9:30 a.m. I --  
3 I'm not sure where defense counsel got that.

4 MR. POWELL: That information appears to be  
5 indicated, Judge, in the -- in the docket entry itself. It  
6 says --

7 THE COURT: Well, why don't we do this, counsel.  
8 We'll -- we'll take a recess. We'll give you a chance to -- to  
9 get the answers to these questions, if they can be determined  
10 in the next hour or so. I will be in chambers. As soon as you  
11 are ready to proceed, I will come back out and we'll go ahead.

12 MR. POWELL: Thank you, Judge.

13 MR. BRESNICK: Thank you, Your Honor.

14 THE COURT: All right?

15 MR. BRESNICK: Sure.

16 THE COURT: Recess.

17 (Recess)

18 THE COURT: All right. Counsel, we're back on United  
19 States versus James Morris. Mr. Powell or Mr. Thompson, you  
20 have looked into this matter, and it's my understanding that  
21 you are going to request some additional time to get a  
22 transcript of the first day of jury selection; is that correct?

23 MR. POWELL: That's correct, Judge. We've had an  
24 opportunity to make a preliminary review of the docket sheet,  
25 but were unable to determine the precise time that we believe

## Colloquy

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1 jury selection actually commenced. There's an issue in our  
2 minds as to whether or not it actually commenced on the -- on  
3 the 17th or the 18th, so we'd like to have an opportunity,  
4 Judge, to get the transcript to try to resolve that issue.

5 THE COURT: All right. Mr. Bresnick, do you have  
6 anything you want to say at this juncture?

7 MR. BRESNICK: No, Your Honor. If the defendant  
8 wants a little more time to look into this issue, that's --  
9 that's fine with the Government. I -- although I stand by my  
10 -- my previous comments, Your Honor. But I think if the Court  
11 is inclined to give them more time, that would be fine with the  
12 Government.

13 THE COURT: All right. Well, I -- I looked at the  
14 case that was cited by counsel. Under all the circumstances,  
15 I'm going to give counsel the opportunity to get that  
16 information. As a matter of fact, counsel, I will direct that  
17 Mr. Finney get a transcript of the proceeding, so that we can  
18 get it immediately. I want to dispose of this matter. I'm  
19 going to reschedule it for next week. And I'm going to expect  
20 that counsel will submit by next Monday the memoranda in  
21 support of the position that you're taking after you get the  
22 information that you need. All right.

23 Now, with regard to rescheduling of the matter,  
24 counsel, I can do the -- on either Thursday or Friday of next  
25 week. What's your pleasure?

## Colloquy

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1 MR. BRESNICK: Thursday is a Federal holiday, Your  
2 Honor. I don't know if that --

3 THE COURT: Federal what?

4 MR. BRESNICK: Veter -- Veterans Day.

5 THE COURT: I guess -- well, we'll do it on Thursday.

6 MR. BRESNICK: I'm available.

7 THE COURT: Counsel, Friday all right?

8 MR. THOMPSON: Friday is fine for us, Judge.

9 MR. POWELL: That's fine, Your Honor.

10 THE COURT: Mr. Bresnick?

11 MR. BRESNICK: Yes, Your Honor. Yes.

12 THE COURT: All right. We'll reschedule it for 9:30  
13 on Friday morning. And we will address the issues at that  
14 time. Okay?

15 MR. BRESNICK: I'm sorry, Your Honor, you said 9:30?

16 THE COURT: 9:30.

17 MR. BRESNICK: Yes.

18 THE COURT: Yes. All right. We'll recess. And  
19 counsel, I'd like to see you at sidebar off the record.

20 DEPUTY CLERK: Off the record, Judge?

21 THE COURT: Yes.

22 (Proceedings concluded at 11:27 a.m.)

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C E R T I F I C A T I O N

I, Brenda Boulden, court approved transcriber, certify  
that the foregoing is a correct transcript from the official  
electronic sound recording of the proceedings in the above-  
entitled matter.

\_\_\_\_\_  
DATE  
  
\_\_\_\_\_  
BRENDA BOULDEN